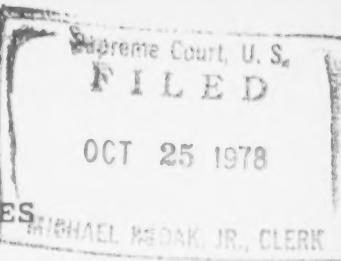


IN THE  
SUPREME COURT OF THE UNITED STATES



OCTOBER TERM, 1978

No. 78-697

FRANCIS LEO MARKS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT AND APPENDIX

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IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1978

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No. \_\_\_\_\_

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FRANCIS LEO MARKS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

To The Honorable, The Chief Justice and The  
Associate Justices of the Supreme Court of  
the United States:

Petitioner, Francis Leo Marks, respect-  
fully prays that a writ of certiorari issue

to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 25, 1978, reinstating its prior judgment, which reversed orders of the United States District Court for the Southern District of Ohio suppressing evidence in this federal criminal prosecution and remanded the case.

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#### OPINIONS AND ORDERS

The original opinion and judgment of the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") appears at 560 F.2d 214 (6th Cir. 1977). The Order of this Court granting Certiorari, vacating the judgment of the Sixth Circuit and remanding the case for further consideration appears at 436 U.S. ...., 98 S.Ct. 2841 (1978). The Order of the Sixth Circuit on remand, not yet reported, is reprinted in the Appendix attached

to this petition (A. 1a-3a).<sup>1</sup> The unreported memoranda and orders of the District Court are reprinted in the Appendix to the Petition for Certiorari heretofore filed in this Court by petitioner at No. 77-606. (A. [77-606] 18a-38a, 39a-44a).

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#### JURISDICTION

The Order of the Sixth Circuit reinstating its prior judgment was entered on July 25, 1978. A timely petition for a rehearing en banc was denied on August 29, 1978 (A. 4a), and this Honorable Court has extended this petitioner's time to file his petition for a writ of certiorari to October 28, 1978. This petition for a writ of certiorari was filed within the

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1. References to the Appendix to this petition will be cited as (A. ....). References to the Appendix to the petition filed at No. 77-606 in this Court will be cited as (A. [77-606] ...).

time granted by said extension of time (A. 7a). On October 6, 1978, the Sixth Circuit granted petitioner's motion to stay issuance of its mandate pending the filing of this petition (A. 5a & 6a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Petitioner states that Consolidation Coal Company (Hereinafter: Consol) at No. 78-532 and Raymond J. Zitko, at No. 78-537, have filed a petition for a writ of certiorari in this case.

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#### QUESTIONS PRESENTED

1. Whether the less stringent administrative search probable cause standard recently articulated by this Court in Marshall v. Barlow's Inc., 436 U.S. ...., 98 S. Ct. 1816 (1978) and Michigan v. Tyler, 436 U.S. ...., 98 S. Ct. 1942 (1978) is applicable in this case where it is undisputed that the purpose of the searches and seizures in question was the

discovery of evidence of suspected criminal violations?

2. Whether administrative search warrants may be employed to force entry into a coal mine operator's private mine offices and seize documents and other property found there despite the specific provisions in the Federal Coal Mine Health and Safety Act of 1969 envisioning resort to federal court enforcement proceedings when entry or the production of documents and records is refused?

3. Whether the affidavits used to obtain the search warrants at issue supply the requisite probable cause?

4. Whether a corporate supervisory employee has standing as a person aggrieved pursuant to Federal Rule of Criminal Procedure 41(e) to challenge the searches and seizures of evidence from Consolidation Coal Company's six corporate offices where said employee is:

(1) the chief environmental technician and is the immediate supervisor of each individual environmental technician; (2) as chief environmental technician is responsible for maintaining all of said corporation's respirable dust records, which records were the object of the government's search and seizure; and (3) as chief environmental technician conducts corporate business in each of the corporate offices searched?

5. Is the government entitled to an evidentiary hearing pursuant to Federal Rule of Criminal Procedure 41(e), when it never requests such a hearing, nor does it challenge the factual allegations of the person asserting his position as a person aggrieved pursuant to Federal Rule of Criminal Procedure 41 (e)?

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## CONSTITUTIONAL AND STATUTORY PROVISIONS

## U.S. Const. Amend. IV-Searches And Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The provisions of the Federal Coal Mine Health and Safety Act of 1969 (Hereinafter: "Mine Safety Act") relevant to the issues raised in this case are lengthy and have therefore been set forth in the Appendix attached to this petition (A. 8a-19a). The sections involved are:

Section 103 (30 U.S.C. §813),  
entitled "Inspections and Investi-  
gations";

Section 108 (30 U.S.C. §818),  
entitled "Injunctions"; and

Section 109 (30 U.S.C. §819),  
entitled "Penalties".

---

#### STATEMENT OF THE CASE

This case was previously before this Court on a petition for a writ of certiorari at No. 77-606. The petition was granted on June 5, 1978, the prior judgment of the Sixth Circuit vacated and the case remanded "for further consideration in light of Marshall v. Barlow's Inc., 436 U.S. ... (1978) and Michigan v. Tyler, 436 U.S. ... (1978)." 436 U.S. ..., 98 S.Ct. 2841 (1978).

On July 25, 1978, the Sixth Circuit, on remand, entered an Order reinstating its prior judgment for the reasons set forth in its original opinion (560 F.2d 214) and remanding the case to the District Court.

This matter began on May 21, 1974, when, at the request of attorneys from the Government Regulations and Labor Section, Criminal Division, United States Department of Justice, a federal magistrate issued search warrants to enter various offices in petitioner's Central Division in Eastern Ohio to search for evidence of suspected criminal violations.

All of the warrants<sup>2</sup> but one were based upon the affidavit of William E. Holgate (A. [77-557] 53a-56a), an employee of the Mining Enforcement and Safety Administration of the Department of the Interior. The remaining warrant was supported by both Holgate's affidavit and that of Thomas A. Jeskey (A. [77-557] 58a-60a), a federal coal mine inspector. These affidavits referred

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2. The six search warrants involved in this case, with attached returns and affidavits, have been reprinted in Consolidation Coal Company's Appendix in No. 77-557 at pages 45a-95a. (Hereinafter: references to the appendix filed at No. 77-557 in this Court will be cited as (A. (77-577)...). To avoid duplication, the typewritten portions of the Holgate affidavit filed in support of each warrant were reproduced only with respect to the first warrant.

to information obtained from an unnamed former employee of petitioner concerning alleged irregularities in petitioner's respirable dust sampling program and recited that evidence of violations of criminal provisions of the Mine Safety Act was believed to be concealed in the mine offices to be searched. (See, e.g., A. [77-557] 52a-55a).

Searches were conducted pursuant to the warrants in a surprise raid on May 22, 1974, by federal inspectors who had been appointed special deputy United States Marshals. There was no prior demand upon petitioner for the desired materials, nor were any federal court enforcement proceedings initiated to obtain them.

On the authority of the warrants, the deputies entered the offices of petitioner and Consol and confiscated a great mass of books, note pads, folders and cassettes, as well as metal file card containers, entire file cabinets

or drawers, and a set of scales, (See, e.g. A. [77-557] 51a, 87a, 93a).

In August of 1975, indictments were returned against petitioner, Consol, and seven other of Consol's current or former employees, charging numerous separate violations of two criminal provisions of the Mine Safety Act and two counts of criminal conspiracy. The indictments were based, entirely or primarily, upon the materials seized in the May, 1974 raid and the fruits of the seized materials.

Accordingly, Consol filed a motion to suppress various items of evidence taken from certain buildings and mines belonging to Consol. Said property was subsequently found by the district court to be taken by means of invalid and defective search warrants and said evidence was ordered by said court on June 10, 1976, to be suppressed as to Consol.

The district court's order of June 10, 1976, granted Consolidation Coal Company's motion to suppress the evidence seized from the following locations, to-wit:

- (1) The Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio;
- (2) The mine office, Franklin No. 25 coal mine of Consolidation Coal Company, Ohio State Route 149, New Athens, Harrison County, Ohio;
- (3) The mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio;
- (4) The mine office, Rose Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale, Harrison County, Ohio;
- (5) The mine office, Oak Park No. 7 coal mine of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio;

(6) The mine office, Friendship Park Highwall No. 15 coal mine, of Consolidation Coal Company, Ohio State Route 151, Smithfield, Jefferson County, Ohio. (A. [77-606] 33a)

However, the district court ruled that each individual's motion to suppress was denied without prejudice, because said defendants had to demonstrate their standing as a "person aggrieved" by the government's searches and seizures. (A. [77-606] 20a and 21a). Thus, on July 14, 1976, petitioner filed his Motion To Suppress and Memorandum In Support Of Motion To Suppress By Defendant Francis Leo Marks.

In said Motion To Suppress and Memorandum In Support thereof petitioner set forth the following facts, to-wit:

(1) Defendant Marks was the Chief Environmental Technician of Consol's Midwest Region and in such capacity was the immediate supervisor of each individual

Environmental Technician;

- (2) Defendant Marks was responsible for the maintaining of all respirable dust records;
- (3) Defendant Marks was present during the search and seizure at the Georgetown office;
- (4) Defendant Marks visited each mine office regularly and conferred with the environmental technician at each mine office; and
- (5) That the evidence seized was to be used against Defendant Marks and was evidence of an essential element of the crimes with which this defendant was charged.

The government further admitted the following facts as to petitioner in its Memorandum filed with the district court on September 14, 1976, opposing Petitioner Marks' Motion To Suppress, to-wit:

- (1) Marks was the Chief Environmental Technician for Consol's Midwest Region;
- (2) That Marks "had supervisory responsibility over the other technicians, their papers and their offices";
- (3) That Marks had standing to contest the legality of the search of his office at Georgetown, Ohio;
- (4) That Marks was present at his office on May 22, 1974, the day said offices of Consol were searched.

Further, the government neither contested any factual allegation of Petitioner, nor moved for an evidentiary hearing in this matter.

On October 4, 1976, the Court granted Petitioner's Motion To Suppress said evidence.

Respondent appealed under the provisions of 18 U.S.C. §3731, certifying that the suppressed evidence was "a substantial proof of the charge[s] pending against the defendant[s]". On July 21, 1977, the Sixth Circuit reversed and remanded, a plurality of the panel holding, sua sponte, that the administrative standard of probable cause announced in Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967) applied in this case and that the affidavits satisfied this less stringent test. Circuit Judge Engel, concurring in the result, concluded that the affidavits had met the more onerous standards of Aguilar and Spinelli, but found "certain issues relating to administrative searches and seizures covered [in the majority opinion] ...sufficiently troublesome...that...their resolution [should be saved] until the case arises which demands it". (A. [77-606] 18a)

Further, the Sixth Circuit held in footnote 7 of its Opinion (A. [77-606] 4a) that "The issue as to standing of Marks and Zitko to challenge the searches is mooted by our disposition of their appeals on other grounds". Therefore, the Sixth Circuit never passed on the standing question of this Petitioner.

Following this Court's vacation of the judgment and remand of the case for reconsideration in light of Marshall and Tyler, a plurality of the original panel of the Sixth Circuit, without requesting briefs or hearing oral argument, issued a summary opinion and Order reinstating its previously vacated judgment on the basis that there was "no reason to alter...[the] original holding." (A. 2a). Again, Circuit Judge Engel concurred in the result "for the more limited reasons expressed in his original concurrence." (A. 3a).

REASONS FOR GRANTING THE WRIT

1. The Decision of the Sixth Circuit Is in Direct Conflict With the Decision of This Court in Michigan v Tyler.

Petitioner, Francis Leo Marks, incorporates by reference Consolidation Coal Company's argument on this point in its petition for a writ of certiorari filed in this Honorable Court at No. 78-532.

2. The Sixth Circuit Has Improperly Construed the Mine Safety Act as Sanctioning the Use of Administrative Warrants to Conduct Searches and Seizures in Petitioner's Private Offices and, in so Doing, Is in Conflict With the Ninth Circuit.

Petitioner, Francis Leo Marks, incorporates by reference Consolidation Coal Company's argument on this point in its petition for a writ of certiorari filed in this Honorable Court at No. 78-532.

3. The Affidavits Used to Obtain the Search Warrants at Issue Failed to Supply the Requisite Probable Cause for the Issuance of the Warrants.

Petitioner, Francis Leo Marks, incorporates by reference Consolidation Coal Company's argument on this point in its petition for a writ of certiorari filed in this Honorable Court at No. 77-557.

4. Whether a corporate supervisory employee has standing as a person aggrieved pursuant to Federal Rule of Criminal Procedure 41(e) to challenge the searches and seizures of evidence from Consolidation Coal Company's six corporate offices where said employee is: (1) the chief environmental technician and is the immediate supervisor of each individual environmental technician; (2) as chief environmental technician is responsible for maintaining all of said corporation's respirable dust records, which records were the object of the government's search and seizure; and (3) as chief environmental technician conducts corporate business in each of the corporate offices searched?

Petitioner, Francis Leo Marks, incorporates by reference his argument on this point set forth in his petition for a writ of certiorari filed in this Honorable Court at No. 77-606.

5. Is the government entitled to an evidentiary hearing pursuant to Federal Rule of Criminal Procedure 41(e), when it never requests such a hearing, nor does it challenge the factual allegations of the person asserting his position as a person aggrieved pursuant to Federal Rule of Criminal Procedure 41(e)?

Petitioner, Francis Leo Marks, incorporates by reference his argument on this point set forth in his petition for a writ of certiorari filed in this Honorable Court at No. 77-606.

#### CONCLUSION

Petitioner respectfully submits that for the foregoing reasons and the reasons stated in the petitions for writ of certiorari filed in this Court by Petitioner's Co-Petitioners, Consolidation Coal Company and Raymond J. Zitko, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

# Appendices

APPENDIX A

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FILED JULY 25, 1978  
JOHN P. HEHMAN, Clerk

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Nos. 76-2518, 76-2521 and 76-2522

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UNITED STATES COURT OF APPEALS FOR THE  
SIXTH CIRCUIT

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NO. 76-2518  
UNITED STATES OF AMERICA,  
Plaintiff-Appellant,  
v.  
CONSOLIDATION COAL COMPANY,  
Defendant-Appellee.  
NO. 76-2521  
UNITED STATES OF AMERICA,  
Plaintiff-Appellant,  
v.  
FRANCIS LEO MARKS,  
Defendant-Appellee.  
NO. 76-2522  
UNITED STATES OF AMERICA,  
Plaintiff-Appellant,  
v.  
RAYMOND ZITKO,  
Defendant-Appellee.

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ORDER

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Before: CELEBREZZE and ENGEL, Circuit Judges,  
and CECIL, Senior Circuit Judge.

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In *United States v. Consolidation Coal Co.*, 560 F. 2d 214 (6th Cir. 1977), vacated and remanded.....U.S. ..... (1978), this court reversed the district court's suppression of evidence seized from the offices of a coal mine operator. We reasoned that the district court erred in applying conventional criminal probable cause tests in examining the sufficiency of the search warrants involved. We upheld the warrants based upon "a lesser showing of probable cause comparable to that required to obtain a warrant to perform a periodic, administrative inspection of a commercial establishment." 560 F. 2d at 218.

Three defendants petitioned the Supreme Court for writs of certiorari. In response thereto, the Supreme Court vacated our judgment and remanded the causes to this Court "for further consideration in light of *Marshall v. Barlow's, Inc.*, 436 U.S. ..... (1978) and *Michigan v. Tyler*, 436 U.S. ..... (1978)."

Inasmuch as the searches in question were conducted pursuant to search warrants and we have determined that the warrants met the same administrative search probable cause standard articulated in *Marshall*<sup>1</sup> and *Tyler*,<sup>2</sup> we see no reason to alter our original holding. Moreover, our holding that administrative search warrants were required under the facts of this case under the Federal Coal Mine Health and Safety Act of 1969 is fully consistent with the holding in *Marshall* that administrative search warrants are required under the Occupational Safety and Health Act of 1970.

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1. Continued
2. Continued

Therefore, it is hereby ordered that the prior judgment of this court be reinstated for the reasons set forth in our original opinion, 560 F. 2d 214, and the judgment of the district court is reversed and the causes are remanded for further proceedings consistent with that opinion.

Judge Engel concurs, but for the more limited reasons expressed in his original concurrence. See 560 F. 2d at 222.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN,  
Clerk

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1. Continued  
Marshall v. Barlow's, Inc., 436 U.S. ...., ..(1978),  
Slip Opinion at 12-13.

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2. Continued  
Michigan v. Tyler, 436 U.S. ...., ...n.5 &(1978),  
Slip Opinion at 6 n. 5 & 8.

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Nos. 76-2518, 76-2521 and 76-2522

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, )  
Plaintiff-Appellant,

v. ) ORDER

CONSOLIDATION COAL COMPANY, a  
corporation, FRANCIS LEO MARKS, )  
RAYMOND ZITKO, Individuals.  
Defendants-Appellees. )

Before: CELEBREZZE and ENGEL, Circuit Judges,  
and CECIL, Senior Circuit Judge

Appellee, Consolidation Coal Company,  
filed a petition for rehearing with a request  
for rehearing en banc. No judge of this Court  
having moved for a rehearing en banc, the  
petition to rehear has been referred to the  
hearing panel.

Upon consideration, the Court being  
advised, it is ORDERED that the petition for  
rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT

s/ JOHN P. HEHMAN

Clerk

Filed:

August 29, 1978

John P. Hehman, Clerk

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

No. 76-2521

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United States of America,  
Plaintiff-Appellant

v.

Francis Leo Marks,  
Defendant-Appellee

Darrell Hazelwood	Samuel Kirkland
Raymond J. Zitko	Paul R. Kidney
James Kull	Robert Lasick
Richard Schrickel	Consolidation Coal Co.,
	Defendants

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate  
herein pending application to the Supreme  
Court for writ of certiorari is hereby granted  
and the mandate is stayed for thirty days from  
this date; provided that, if within such thirty  
days, the applicant shall file with the Clerk  
of this Court the certificate of the Clerk of  
the Supreme Court that the certiorari petition,  
record, and brief have been filed, the stay  
shall continue until the final disposition of  
the case by the Supreme Court. Unless this  
condition is complied with within such thirty  
days or any extension thereof made by the Court  
or any judge thereof, or if the condition is

complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

s/ JOHN P. HEHMAN

John P. Hehman, Clerk

Filed:  
October 6, 1978  
John P. Hehman, Clerk

SUPREME COURT OF THE UNITED STATES

No. A-292

FRANCIS LEO MARKS,  
Petitioner,

v.  
UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR  
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 28, 1978.

/s/ Potter Stewart  
Associate Justice of the  
Supreme Court of the  
United States

Dated this 29th day of September, 1978

Section 103 (30 U.S.C. §813) of the Federal Coal Mine Health and Safety Act of 1969.

#### INSPECTIONS AND INVESTIGATIONS-PURPOSES

(a) Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this sub-chapter. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of clauses (3) and (4) of this sub-section in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year.

#### Right of entry of investigators

(b) (1) For the purpose of making any inspection or investigation under this chapter, the Secretary or any authorized representative of the Secretary shall have a right of entry to, upon, or through any coal mine.

(2) For the purpose of developing improved mandatory health standards, the

Secretary of Health, Education, and Welfare or his authorized representative shall have a right of entry to, upon, or through, any coal mine.

(3) The provisions of this chapter relating to investigations and records shall be available to the Secretary of Health, Education, and Welfare to enable him to carry out his functions and responsibilities under this chapter.

#### Utilization of facilities and personnel of other Federal agencies

(c) For the purpose of carrying out his responsibilities under this chapter, including the enforcement thereof, the Secretary may by agreement utilize with or without reimbursement the services, personnel, and facilities of any Federal agency.

#### Hearings; subpena; fees; contempt

(d) For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business,

upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Notice of accident; preservation of evidence; supervision of rescue operations

(e) In the event of any accident occurring in a coal mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal mine where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine.

Orders to insure protection of persons and property

(f) In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of

such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal.

Imminent danger notice; requisites; special inspection

(g) Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter.

Accompaniment right of representative of miners

(h) At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

## Hazardous conditions; spot inspections

(i) Whenever the Secretary finds that a mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine other especially hazardous conditions, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals.

Pub.L.91-173, Title I, §103, Dec. 30, 1969,  
83 Stat. 749.

Section 108 (30 U.S.C. §818) of the Federal  
Coal Mine Health and Safety Act of  
1969.

CIVIL ACTION FOR RELIEF; JURISDICTION  
AND VENUE; GROUNDS FOR INVOCATION OF  
REMEDIES; FORCE AND EFFECT OF ORDERS;  
REPRESENTATION OF SECRETARY

The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent (a) violates or fails or refuses to comply with any order or decision issued under this chapter, or (b) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this chapter, or (c) refuses to admit such representatives to the mine, or (d) refuses to permit the inspection of the mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine, or (e) refuses to furnish any information or report requested by the Secretary or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this chapter, or (f) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter. Each court shall have jurisdiction to provide such relief as may be appropriate.

Temporary restraining orders shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce an order under clause (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless, prior thereto, the district court granting such relief sets it aside or modifies it. In actions under this section, subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him. In any action instituted under this section to enforce an order or decision issued by the Secretary after a public hearing in accordance with section 554 of Title 5, the findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

Pub.L.91-173, Title I, §108, Dec. 30, 1969,  
83 Stat. 756

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Section 109 (30 U.S.C. §819) of the Federal  
Coal Mine- Health and Safety Act of  
1969.

**PENALTIES-CIVIL PENALTIES FOR VIOLATIONS  
OF MANDATORY HEALTH AND SAFETY STANDARDS;  
HEARINGS; FACTORS DETERMINING ASSESSMENT;  
FINDINGS; APPLICABILITY OF SECTION 554  
OF TITLE 5; PROCEDURES FOR ENFORCEMENT**

(a) (1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, except the provisions of subchapter IV of this chapter, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health and safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any minor who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than \$250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 815 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review

proceedings before a court of appeals under section 816 of this title, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

**Willful violations or refusal to comply with health and safety standards by operators of mines**

(b) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 820(b) (2) of this title, shall, upon conviction, be punished by a fine of not more than \$25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than \$50,000, or by imprisonment for not more than five years, or by both.

**Willful violations or refusal to comply with health and safety standards by corporate operators of mines**

(c) Whenever a corporate operator violates

a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 820(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

#### False statements or representations

(d) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter or any order or decision issued under this chapter shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both.

#### Distribution or sale of noncomplying components

(e) Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this chapter, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall,

Appendix.

19a

upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (d) of this section.

Pub.L.91-173, Title I, §109, Dec. 30, 1969,  
83 Stat. 756.

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